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IN THE

Supreme Court of the United States

October Term, 1971

~~No. 143~~ 71 - 143

BRYAN W. STEVENS, BARBARA STEVENS, STANLEY SAPIRO and MARION SAPIRO,
Petitioners and Appellants,
vs.
PHILIP E. WATSON, as Assessor of the County of Los Angeles,
Defendant and Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS OF THE COURT BELOW

The opinion of the court (California Court of Appeal, Second Appellate District) which rendered the judgment sought to be reviewed is reported in 16 Cal. App. 3rd 629, 94 Cal. Rptr. 190 (1971).[1] Petitioners did not file a Petition for Rehearing following the decision of that Court. Under California appellate practice, therefore, petitioners were not en-

[1]References to the opinion herein will be to the text appearing in Appendix I to the Petition for Certiorari, cited "App. ....."

titled in petitioning for hearing in the California Supreme Court to rely upon any claim that material facts were omitted from or incorrectly stated in the opinion of the Court of Appeal. (California Rules of Court, Rule 29(b)).[2]

The petition for hearing in the Supreme Court of California was denied by order of June 9, 1970. Thus by final order of the California appellate courts the judgment of the California Superior Court, sustaining Respondent Watson's demurrer to the Petition for Writ of Mandate and Declaratory Relief, without leave to amend, has been affirmed.

CONSTITUTIONAL PROVISIONS INVOLVED

At issue is Section 2.6 of Article XIII of the California Constitution, adopted by the people as an initiative measure in 1960, providing that in assessing real property used for at least two years exclusively for non-profit golf courses, the assessor shall consider no factors other than those relative to such use.[3] Section 2.6 is here challenged as a violation of the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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[2]Rule 29(b) provides: [Examination of record] On petition for hearing the Supreme Court will not examine the record for error unless the petition shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that such issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal. [As amended affective July 1, 1970; previously amended effective Nov. 11, 1966.]

[3]The full text of the measure is set forth in the Petition for Certiorari (p. 5) and in the opinion of the California Court (App. p. 2) .

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Does a provision of the California Constitution, construed by the California Court to represent a broad, neutral state policy of conservation of property used exclusively for non-profit golf courses by establishing a partial tax exemption for such property, violate the Equal Protection Clause because it may incidentally benefit private golf clubs which arbitrarily discriminate in their membership policies?

2. Does such a provision of the California Constitution violate the Equal Protection Clause because it applies only to non-profit golf courses in operation for at least two years, and if so, do petitioners who do not own or have any interest in golf courses operated for less than two years, have standing to attack the measure on this ground?

STATEMENT OF THE CASE

Petitioners have not requested the Court below to certify any record to this Court. Inasmuch as petitioners did not file a Petition for Rehearing following the decision and opinion of the Court below, we assume they do not contend that material facts were omitted from or incorrectly stated in the opinion. (App. 2-4; n. 2, *supra*)

In any event, the only facts appearing in the Record are the allegations of the Petitioners' pleading in the trial court. Respondent accepts the sum-

mary thereof appearing at pages 7 to 10 of the Petition for Certiorari.[4]

The only party Respondent is Philip E. Watson, the Tax Assessor of Los Angeles County, who was the only such party served and who appeared in the proceedings below. Named as fictitious "Doe" respondents, but who were never served and who did not appear, were the non-profit golf clubs in Los Angeles County eligible for assessment under Section 2.6 (Opinion Below, App. at p. 3). The Courts below did not consider whether petitioners' claim failed in any event for lack of jurisdiction of the subject matter because of the failure to join and serve such golf clubs as indispensable parties.

Petitioners have sued only in their capacity as property owners and taxpayers. They do not claim to own any property interest in any golf courses which do not qualify under Section 2.6, i.e., profit making golf courses, or of non-profit golf courses of less than ten acres or which have been in operation less than two years.

The Court below assumed, *sub silentio,* that petitioners as taxpayers, had standing to attack Section

[4]We assume that the Court will not consider Petitioners' frequent excursions outside the Record in their references to motion pictures (pp. 5-6), newspaper articles (p.34), the alleged notoriety of racial and religious discrimination of golf course operators and its immunity from public criticism because of the extreme financial, political and social power of the discriminators (p. 6), equating golf course operators to Herr Hitler (p. 17) and to the golf courses as places where "Goebbels would be the Messiah, George Wallace the high priest and the Ku Klux Klan the Vestal Virgins" (p. 24). We treat these allegations, wholly unsupported in the record, as pejorative hyperbole, warranting no response.

2.6 on all grounds urged except it questions, as does Respondent, petitioners' standing to raise question number 4 in their Petition (p. 5), that Section 2.6 offends equal protection in that it does not apply to non-profit golf courses operating for less than two years because petitioners have no interest in any such property.

ARGUMENT

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. As authoritatively construed by the California Court, the purpose, scope, and operative effect of Section 2.6 of Article XIII of the California Constitution is in furtherance of a neutral State policy of conservation of property used for golf courses, a proper public purpose, and tends to promote the general welfare.

In its opinion the Court below considered in detail the purpose, scope, and operative effect of Section 2.6. The Court found that the Section "fits into an over-all plan in which the State's power to tax is directed toward discouraging premature development of urban and near-urban land and toward encouraging the preservation of open spaces." (App. p. 7). The Court found that the order sought by Petitioners directing the Tax Assessor to ignore the provisions of Section 2.6 would run counter to the conservation policies of the State of California, as

illustrated by Section 1 of Article XXVIII of the California Constitution as well as in the California Land Conservation Act (Gov't Code, Section 51,200 et seq.) and in cited provisions of the California Revenue and Taxation and Government Codes (App. p. 8). The Court found that the "salient purpose of the measure was to encourage the continued operation of a certain class of golf courses"; set forth in detail seven reasons why the measure was considered desirable to accomplish these purposes; and concluded that the provisions of Section 2.6 were reasonably designed for the accomplishment of such purposes.

We respectfully submit that this Court should give careful consideration and substantial weight to the authoritative interpretation by the California Court of a provision of the California Constitution.

> (*Reitman v. Mulkey* (1967) 387 U.S. 369, 373-376).

Just as the Court in *Reitman* decided there was "no sound reason for rejecting" the judgment of the California Court as to the purpose, meaning and effect of the provision of the California Constitution there involved, there is no reason here for rejecting the finding of the California Court here as to the meaning, purpose and effect of Section 2.6.

2. Section 2.6 is clearly a valid exercise of the broad power of the State to select the subjects of taxation and to grant exemptions therefrom.

The measure under attack is a narrow provision of the California Constitution and a rather routine example of the exercise by the State of its inherent power to select the subjects of taxation and to grant exemptions therefrom. The opinion below sets forth the "elementary principle" that discrimination in tax statutes between parties does no violence to the Equal Protection Clause if the distinction rests on a rational basis. The Court below sets forth in detail a "number of conceivable states of fact that provide rational support for its provisions" (App. pp. 7-10), all that is required to satisfy the Equal Protection Clause. The Court below could have reached no other conclusion with fidelity to the unchallenged line of decisions of this Court starting from *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, than the one it reached: the legislative classifications made in Section 2.6, based upon the three factors of non-profit, ten acres, and two years were proper and reasonable in relation to the purposes of the law. (App. p. 10).

In these circumstances no sound reason exists for granting review to consider any of the questions of classification raised in questions 2, 3 and 4 at page 5 of the Petition for Certiorari.

3. The partial tax exemption afforded by Section 2.6 in furtherance of a neutral State policy of conservation of property used for golf courses does not offend the Equal Protection Clause because it may incidentally benefit private golf clubs which arbitrarily discriminate in their membership policies.

The principal ground relied upon by Petitioners in their Petition relates to question 1 of the questions presented (Petition for Certiorari p. 4). That question is one of "first instance", as claimed by Petitioner (Petition for Certiorari p. 37) only in the sense that it relates to private, non-profit golf courses and because it is a most tendentious characterization of the purpose, meaning and effect of Section 2.6 — a characterization entirely at odds with the interpretation placed on it by the California Court.

Petitioners' argument on this issue is as confused as it is lurid and emotional. A "tremendous tax subsidy" given to "bigoted private clubs but withheld from those clubs which are sufficiently American to allow all comers, regardless of race, religion or color" constitutes significant state involvement in such alleged bigotry as to run afoul of the equal protection clause. (Petition for Certiorari p. 16).

The argument is completely and accurately answered in the opinion of the California Court (App. 11-19). The measure is not, as Petitioners allege, a tax subsidy for bigots which is withheld from real Americans. It is a partial exemption, not a subsidy.

It applies across the board to all property used as specified in the measure — and it applies equally to all who qualify without regard to any of their operating or admissions policies.

Petitioners' argument is completely laid to rest by the decision in *Walz* v. *Tax Commission,* (1970) 397 U.S. 664, in which this Court held that New York's grant of tax exemption to church property did not violate the religious clauses of the First Amendment. The court said:

> "The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other states, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement', should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. Qualification for tax exemption is not perpetual

or immutable; some tax exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption.

". . .

"The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion . . ." (397 U.S. 664, 672-675).

Similarly here the measure is neither "the advancement nor the inhibition of" private discrimination by golf clubs. It is neither "sponsorship nor hostility."

As the Court below found, Section 2.6 is an entirely neutral provision addressed solely to the manner in which certain property shall be assessed. It makes no distinction based upon what class of persons owns the property, or whether the property is or is not open to the public, or on the basis of any conduct of any kind of the owners or occupants. (App. p. 14). To be sure, if the property qualifies under the measure, its owner is entitled to its benefits whether he be a saint or a convicted felon, but that does not constitute California's stamp of approval either of felony or sainthood.

Petitioners' argument proves entirely too much, for if it were sound every service or benefit provided by the state is valid only if every person or entity who benefits from such a provision conducts himself in accordance with the same rigorous standards that the Fourteenth Amendment imposes upon the state itself. If the argument were correct, the Fourteenth Amendment would prohibit the state from giving any public assistance to veterans, orphans, indigents, the sick or the aged if it could be shown that any such persons engaged in discriminatory conduct.

The cases relied upon by Petitioners do not support their position here. The California Court has discussed the various types of government or official involvement in private conduct that is necessary to bring the Fourteenth Amendment into play and why those cases have no application here. (App. 11-19). The Seventh Circuit recently had occasion to differentiate substantially the same line of cases relied upon here by Petitioners in holding that a tax exemption and other state laws applicable to newspapers did not invoke the Fourteenth Amendment so as to give rise to a First Amendment claim against a private newspaper.

> *Chicago Joint Bd.* v. *Chicago Tribune* (7th Cir. 1970), 435 Fed. 2d 470 certiorari denied U.S. Law Week May 18, 1871.

It is significant that in both *Walz* and the *Chicago Joint Bd.* cases, the Courts held that a tax exemption

to a private entity did not violate the specific provisions of the First Amendment — the religious clauses and the free speech clauses. If that is so, it necessarily follows (as the Court below noted, (App. 19), that a tax exemption does not involve the state in the private conduct of the beneficiary of the exemption under the more general proscriptions of the Equal Protection Clause.

Respondent does not contend, as Petitioners suggest, that California policy is immune from the Fourteenth Amendment. Petitioners' difficulty stems from the fact that they complain about the alleged action of the operators of privately owned non-profit golf courses. That is not *state* action. It is *private* action. In *Walz*, this Court emphasized there was "no genuine nexus between tax exemption and establishment of religion." Here there is no genuine nexus between tax exemption and the alleged discriminatory conduct of private clubs.

There being none, Petitioners' main argument, like all their subsidiary ones, is wholly fallacious.

CONCLUSION

The decisions of the Courts below are plainly correct, and the Court of Appeal has written a sound and comprehensive opinion. No substantial or important federal question is raised by Petitioners. Certiorari should be denied.

Respectfully submitted,

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